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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(COMM) 146/2019, IA No.4103/2019 (u/O XXXIX R-1&2 CPC)
& IA No.4105/2019 (u/O XI R-1,3&5 CPC)
PHARMACOSMOS HOLDING A/S Plaintiff

Through: Mr. Pravin Anand, Mr. Dhruv Anand,
Ms. Udit Patro & Mr. Nischay Mall,
Advs.

Versus

LA RENON HEALTHCARE PRIVATE LIMITED
& ANR Defendants

Through: Mr. Sandeep Sharma, Ms. Bitika
Sharma, Ms. Namrita Kochhar & Mr.
A. Dhyani, Advs. for D-1.
Ms. Rajeshwari H., Adv. for D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **10.04.2019**

IA No.5262/2019 (of the defendant no.1 under Order VII Rule 11 CPC)

1. The counsel for the defendant no.1 states that the plaintiff has no cause of action against the defendant no.1; the cause of action pleaded against the defendant no.1 is some promotion material on which the name of the defendant no.1 does not appear and a transcript of a conversation, which the defendant no.1 denies.

2. On the basis of denial of the cause of action pleaded in the plaint, the plaint cannot be rejected.

3. I have however enquired from the counsel for the defendant no.1, whether the defendant no.1 is willing to make a statement that the defendant no.1, during the validity of the patent, will not deal in any drug infringing patent No.291100, under the name 'RAPIFIER' or under any other name.

4. The counsel for the defendant no.1 states that he has instructions
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from the defendant no.1 to make such a statement binding the defendant No.1.

5. The counsel for the plaintiff states that in view of the statement, the suit, insofar as against the defendant no.1 can be decreed for permanent injunction in terms of prayer paragraphs 45(a) and (b) of the plaint dated 17th March, 2019.

6. The counsel for the defendant no.1 states that the defendant no.1 be bound by the aforesaid statement instead of passing of a decree because passing a decree would mean that the statements against the defendant no.1 in the plaint stand accepted and which the defendant no.1 is disputing.

7. Without finding any merit in the pleas in the plaint insofar as against the defendant no.1 and purely on the basis of the statement of the defendant No.1 as aforesaid, a decree for permanent injunction is passed, in favour of the plaintiff and against the defendant no.1, in terms of prayer paragraph 45(a) and (b) of the plaint dated 17th March, 2019.

8. The counsel for the plaintiff gives up the other reliefs against the defendant no.1.

9. Decree sheet, insofar as against the defendant no.1 be prepared.

10. An endorsement of disposal of suit against defendant no.1 be made on the memo of parties by the Court Master in today's date under his signature.

IA No.5263/2019 (of the defendant no.2 under Order VII Rule 11 of the CPC)

11. The counsel for the defendant no.2 / applicant states that post grant opposition to the subject patent of the plaintiff, filed prior to institution of the suit, is pending consideration before the Controller of Patents and per

para no.19 of *Aloys Wobben Vs. Yogesh Mehra* (2014) 15 SCC 360 (as under), this suit for infringement of patent does not lie till the decision of the said post grant opposition.

“19. If any proceedings have been initiated by “any person interested”, under Section 25(2) of the Patents Act, the same will eclipse the right of the same person to file a “revocation petition” under Section 64(1) of the Patents Act. And also, to invoke the right granted under Section 64(1) of the Patents Act, to file a “counter-claim” (in response to an “infringement suit”, to seek the revocation of a patent). This, in our view, would be the natural effect of the words, “Subject to the provisions contained in this Act.....”, appearing at the beginning of Section 64(1) of the Patents Act. And if, the above meaning is not to be assigned to the words “Subject to the provisions of this Act.....”, they would be redundant and superfluous. It is however not necessary to pay a serious thought to the situation referred to above. The above situation, in our considered view, is unlikely to ever arise. This is because, Section 25 of the Patents Act, inter alia, provides for the procedure, for the grant of a patent. The procedure commences with the filing of an application. The second step contemplates publication of the details of the patent sought. The next step envisages, the filing of representations by way of opposition (to the grant of the patent). This advances into a determination by the “Controller”, to grant or refuse the patent. The decision of the “Controller”, leads to the publication of the grant (of the patent). This process finalises the decision of the grant of the patent. All the same, it does not finally crystallise the right of the patent holder. After the grant is published, “any person interested”, can issue a notice of opposition, within one year of the date of publication of the grant of a patent. If and when, challenges raised to the grant of a patent are

disposed of favourably, to the advantage of the patent holder, the right to hold the patent can then and then alone, be stated to have crystallized. Likewise, if no notice of opposition is preferred, within one year of the date of publication of the grant of a patent, the grant would be deemed to have crystallized. Thus, only the culmination of procedure contemplated under Section 25(2) of the Patents Act, bestows the final approval to the patent. Therefore, it is unlikely and quite impossible, that an “infringement suit” would be filed, while the proceedings under Section 25(2) are pending, or within a year of the date of publication of the grant of a patent.”

(emphasis added)

12. I have enquired from the counsel for the defendant no.2 / applicant, who is now the sole defendant, whether there is any screening or stringent admission procedure of a post grant opposition to a patent inasmuch as it is felt that unless there is an stringent admission procedure, mere filing of a post grant opposition should not be permitted to freeze or keep in abeyance the rights of a patentee.

13. The counsel for the defendant no.2 / applicant states that the Controller of Patents examines the post grant opposition before issuing notice thereof to the patentee.

14. Even if it be so, unless frivolous post grant opposition filed, intended only to freeze the rights of the patentee are dismissed *in limine*, such a procedure or such an interpretation would cause immense hardship for a patentee.

15. I have also wondered that if a patentee is disentitled from suing for infringement of patent, the moment a post grant opposition to the patent is filed with the Controller of Patents and till pendency thereof, whether not

the same will cut into and shorten the statutory term of 20 years of validity of patent. I have thus also enquired, whether the term of validity of patent stands extended by the time taken in disposal of post grant opposition.

16. Though the counsel for the defendant no.2 / applicant states that it follows from the judgment aforesaid but on enquiry whether there is any provision in the statute to the said effect that on filing of post grant opposition, the term of the patent stops running, states that there is no such provision.

17. The counsel for the plaintiff states that the dicta of the Supreme Court in *Aloys Wobben* supra, though cited in innumerable decisions since then, has never been interpreted in such a way and he would like to cite case law in this respect.

18. The counsel for the defendant no.2 / applicant also states that she would like to show the Scheme.

19. I may otherwise state that the language of para no.19 of the judgment aforesaid is clear and even though I have entertained doubts as aforesaid but am bound therewith and the plaintiff will perhaps have to approach the Supreme Court.

20. On request, list on 26th July, 2019.

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21. At this stage, the counsel for the plaintiff states that it is the plea of the defendant no.2 Corona Remedies Pvt. Ltd. in its reply to IA No.4103/2019 that it is not infringing the patent No.IN291100 of the plaintiff and the drug 'RAPIFER' of the defendant no.2 has dimer content more than 2.9% while one of the claims of the patent of the plaintiff is of

dimer content not exceeding 2.9%.

22. The counsel for plaintiff states that the suit can be disposed of by binding the defendant no.2 Corona Remedies Pvt. Ltd. to the said statement.

23. The counsel for the defendant no.2 states that the defendant no.2 is bound by its pleading aforesaid and the Court can order to that effect.

24. The counsel for defendant No.2 however further states that the defendant no.2 Corona Remedies Pvt. Ltd. would like to contest the patent.

25. The counsel for the defendant no.2 clarifies that the post grant opposition aforesaid has been filed by another party and not by the defendant no.2 and the time limit for the defendant no.2 to file the post grant opposition has already lapsed. The counsel for defendant No.2 states that the defendant no.2 has a right to file a counterclaim in this suit challenging the validity of the patent of the plaintiff.

26. Once the plaintiff is satisfied with the statement in the reply of the defendant no.2 and agreeable to the disposal of the suit insofar as against the defendant no.2 in terms thereof, in my opinion, the suit need not be kept pending to await the filing of the counterclaim by the defendant no.2.

27. The suit, insofar as against the defendant no.2 Corona Remedies Pvt. Ltd. is thus disposed of by binding the defendant no.2 Corona Remedies Pvt. Ltd. to its statement in para no.(e) of the Preliminary Objections in the reply to IA No.4103/2019.

28. The date of 26th July, 2019 is cancelled.

No costs.

Dasti.

RAJIV SAHAI ENDLAW, J.

APRIL 10, 2019/‘gsr’

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